

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 177 of 1985

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE A.R.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX

Versus

NUFOAM INDUSTRIES

Appearance:

MR AKIL KURESHI with MR MANISH R BHATT for Petitioner
NOTICE SERVED for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE A.R.DAVE

Date of decision: 17/10/2000

ORAL JUDGEMENT

(Per : CHIEF JUSTICE MR DM DHARMADHIKARI)

#. At the instance of the Revenue in relation to assessee's case of the assessment year 1978-79, the following two substantial questions of law have been referred for our opinion under Section 256(1) of the Income Tax Act, 1961:

- "1. Whether, on the facts and in the circumstances of the case, the Tribunal has been right in law in holding that the assessee is entitled to relief u/s. 80J of the Income Tax Act, 1961 on the basis of assessment year 1978-79 being considered as the fourth assessment year excluding the initial year?
2. Whether on the facts and in the circumstances of the case, the assessee is entitled to carry forward deficiency u/s. 80J(3) of the Income-Tax Act, 1961 and claim the same in the year in which the assessee had profits?"

#. Both the above questions arise on the provisions of Section 80J of the Income Tax Act, 1961. The first question is: 'whether the assessee is entitled to relief under Section 80J on the basis of assessment year 1978-79 and can be considered as the fourth assessment year'.

#. The facts leading to the reference of question no. 1 are as follows:

#. The assessee started its production in the year 1973-74. The assessee followed financial year as the previous year upto assessment year 1976-77. Thereafter the assessee applied to the Income Tax Officer for change in previous year. Revised previous year was to end on 30-6-1977 instead of 31-3-1977. The Income Tax Officer permitted the change subject to certain conditions. In view of the change, there was no previous year for assessment year 1977-78. The assessee claimed that in computing the fourth assessment year immediately succeeding the initial year, the assessment year 1978-79 should be treated as the fourth assessment year for granting him relief under Section 80J of the Act. The claim was rejected by the Income Tax Officer and the Commissioner of Income Tax confirmed the same. The Tribunal, however, held in favour of the assessee. In the opinion of the Tribunal "since there was no previous year for assessment year 1977-78 and the income for that year was subjected to tax in the assessment year 1978-79, the assessee was entitled to relief under Section 80J for the assessment year 1978-79. It would be profitable to reproduce the reasoning of the Tribunal on question no.

1 which reads as under:

"According to the scheme of the Income Tax Act the profits of the previous year are brought to tax for each of the assessment years. In other words the charge of tax in accordance with Section 4 of the Act is on the income of the previous year. As a corollary if any relief is due to the assessee in respect of the total income for the given assessment year the said relief has a reference to the profits which are brought to charge for the corresponding previous year. Therefore, viewed from this angle the claim of the assessee is to claim deduction u/s. 80J of the Act in all for a period of five years including the initial year. The period of five effective assessment years would naturally exclude A.Y.1977-78 as there was no previous year for that year and the income for that year is subjected to tax for A.Y. 1978-79. It is trite to say that provisions of Section 80J are intended to give relief to the assessee and it should be so construed as to advance the legislative intent. We rely on the decision of their Lordships of the Gujarat High Court in CIT vs. Satellite Eng. Co. Ltd. 113 ITR 200. It is stated thus:

"The legislature has also been progressively relaxing the provisions relating to earning of tax benefits by new industrial undertakings, the end in view being to encourage the setting up of new industries by substantial investment of new capital. Any interpretation of such a provision must, therefore, be in consonance with this avowed aim and object of the legislature and not such as would defeat the same."

In the above view of the matter therefore we are of the opinion that the assessee is entitled to relief u/s. 80J of the Act on the basis of A.Y. 78-79 being considered as the fourth assessment excluding the initial year."

#. In this Reference notice was sent and has been served on the assessee, but, no one appears to represent the assessee. Learned counsel appearing for the Revenue very fairly placed the decision of Madras High Court in Rockweld Electrodes India Ltd. v. Commissioner of Income-Tax (1990) 185 ITR 62 and the recent decision of Supreme Court in Premier Cable Company Limited v.

Commissioner of Income Tax (1999) 237 ITR 202. We find that question No.1 raised before us is squarely covered by the decisions of the Supreme Court and Madras High Court (supra). In answering a similar question, the Supreme Court held as under:

"Section 2(9) of the Income-tax Act, 1961, defines the assessment year to be the period of 12 months commencing on the first day of April every year. It is a standard period of 12 months commencing on April 1 of every year. It does not depend upon one or other assessee and whether or not he had a previous year relevant to a particular assessment year. It is as invariable as the calendar year. The "assessment years" mentioned in sections 33 and 80J must be read in this light. The unabsorbed development rebate under section 33 and the unabsorbed deduction under section 80J may be carried forward only for the eight and four assessment years, respectively, that follow the assessment year relevant to the previous year in which the said development rebate and deduction were first earned. The fact that a particular assessee did not have a previous year relevant to a particular assessment year that fell within these spans of eight and four assessment years, respectively, is of no consequence to the calculation of the periods for which the aforesaid development rebate and deduction can be carried forward."

#. We are also in respectful agreement with the view expressed by Madras High Court in Rockweld Electrodes India Ltd. (supra). As held by Madras High Court, the concept of "assessment year" must be understood in the manner prescribed under the provisions of the Income-tax Act and not with reference to a particular assessee. Whenever the assessee is permitted to get relief for a specified number of consecutive assessment years, the assessment years should be taken in the natural sequence. Irrespective of the change of the assessment year of the assessee, the period of four years will have to be reckoned on the basis of definition of "assessment year" as contained in Section 2(9) of the Income Tax Act, 1961.

Consequently, the question No.1 is answered against the assessee and in favour of the Revenue.

#. So far as the question no. 2 is concerned, it is related to the assessee's claim for relief under subsection (3) of Section 80J. The assessing Authority

and the Commissioner of Income Tax (Appeals) rejected the claim of the assessee based on Section 80J(3) stating that the deficiency was not worked out for the initial year and other immediately succeeding years upto assessment year 1976-77. It was held that the assessee could not claim the carry forward of deficiency which was not computed and determined for the earlier years. The Tribunal in allowing the claim relied on its earlier decision and held that the assessee was entitled to carry forward the deficiency for the assessment year. Two decisions directly covering question no. 2 have been brought to our notice. The first is from Calcutta High Court in Hind Wire Industries Limited v. Commissioner of Income Tax (1992) 195 ITR 450. The Calcutta High Court answered similar question thus:

"The contention of the Revenue that section 80J(3) does not contemplate any contingency like loss for the purpose of carry forward of deficiency cannot be accepted. If this contention is accepted, the whole object of the section would be made nugatory. It is now well settled that profits and gains would also include negative figure (loss). It may be mentioned that this court in the case of Indian Aluminium Co. Ltd. v. CIT (1980) 122 ITR 660, considered the question whether the assessee could claim set off of the deficiency relating to earlier years against the profits of the current year. In other words, the question was whether, in a case where the assessee, admittedly, had suffered loss but did not make any claim for carry forward of deficiency and no deficiency was carried forward, in the subsequent years, such deficiency could be allowed against the profits of the year in which such claim was made. This decision would show that the contingency of a loss being suffered by an industrial undertaking is one of the normal and usual incidents of the business which cannot be ignored in construing the provisions of Section 80J(3). The "deficiency" referred to in section 80J is the amount by which the profits and gains derived by an assessee from the eligible undertaking and included in its gross total income for any assessment year within the "tax holiday" period falls short of the amount calculated at six per cent per annum on the capital employed in the eligible undertaking during the previous year relevant to that assessment year. Where there are no profits and gains, or where there is a loss for any such

assessment year, the deficiency in relation to that assessment year is to be taken to be an amount calculated at six per cent per annum on the capital employed in the undertaking during the relevant previous year."

#. The second decision is from Bombay High Court in Commissioner of Income Tax v. T. Maneklal Manufacturing Company Limited (1991) 192 ITR 268. The Bombay High Court has also taken a similar view and held thus:

"Section 80J of the Act or the Rules made under the Act do not prescribe any obligation for computation of the 80J deficiency in the year to which it pertains as a condition precedent to the carry forward of the said deficiency to the subsequent years and such a condition cannot be implied. Section 80J deficiency cannot be equated to computation of loss. The assessee must be held entitled to avail of the benefit of carry forward and set off of section 80J deficiency in the year of profit even in the absence of computation thereof in the year of loss. Therefore, the Tribunal was right in holding that the deficiency under section 80J of the Income-Tax Act, 1961, in respect of the assessment year 1968-69 should be computed and allowed to be carried forward and set off in the assessment years 1971-72 and 1972-73."

#. Both the Bombay and Calcutta High Courts in the decisions (supra) have taken the view that the obligation of computation of deficiency under Section 80J in the year to which it pertains is not a condition precedent for allowing the carry forward of the said deficiency to the subsequent year and in the absence of clear provision such a condition cannot be read by implication. 'Deficiency' referable to Section 80J cannot be equated to 'computation of loss' as to require computation as a condition for carrying it forward. The assessee, therefore, became entitled to avail of the benefit of carry forward and set off of Section 80J deficiency in the year of profit even in the absence of computation thereof in the year of loss.

##. We find ourselves in respectful agreement with the views expressed by Calcutta and Bombay High Courts in the decisions (supra).

In the result, question no. 2 is answered against the Revenue and in favour of the assessee.

In view of the partial success of this Reference and as the assessee is not represented, we make no order as to costs.

(D.M. Dharmadhikari, C.J.)

(A.R. Dave, J)

[sndevu]